

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110309
Docket: 10-5088
Registry: Victoria

Between:

**D. Manning & Associates Inc.
and Serving For Success Consulting Ltd.**

Petitioners

And:

**The General Manager Liquor Control and Licensing Branch,
Ministry of Housing and Social Development
as represented by the Attorney General in Right of British Columbia**

Respondents

Before: The Honourable Mr. Justice Johnston

Oral Reasons for Judgment

Counsel for Petitioner D. Manning &
Associates Inc.:

J. Zaitsoff
(appearing via teleconference)

Counsel for Respondent General Manager,
Liquor Control and Licensing Branch:

T. Mason

Place and Date of Hearing:

Victoria, B.C.
March 9, 2011

Place and Date of Judgment:

Victoria, B.C.
March 9, 2011

[1] **THE COURT:** The petitioner D. Manning & Associates Inc. seeks several orders or declarations, principally that a notice of enforcement action commenced by the respondent General Manager, Liquor Control and Licensing Branch, dated November 22nd, 2010, is a nullity as against the petitioner, or in the alternative for an order or declaration that a waiver signed by the petitioner on December 7, 2010, is a nullity.

[2] The petitioner seeks an order or declaration that penalties and suspension pronounced against the operator of a lounge in a hotel run by the petitioner as a receiver is a nullity, and an order in the nature of *mandamus* requiring the General Manager to conduct an enforcement hearing.

[3] In the petition, the petitioner also sought an order in the nature of prohibition, that the respondent stop prosecuting the infraction it alleges against the operator of the lounge, because s. 43(2)(b) of the *Liquor Control and Licensing Act* is too vague. That was not pursued or pursued actively on the argument of the petition, and I consider it as abandoned.

[4] There are claims for other consequential relief that I need not deal with.

[5] By way of background, the petitioner was appointed receiver of the City Centre Manor Hotel by order of this court, August 20, 2009. That hotel has a lounge in which liquor is served. City Centre Manor Holdings Ltd. held the licence under which liquor was sold in the lounge. The name of the lounge, I understand, is Soprano's Karaoke and Sports Bar. The lounge was operated by the party named as a co-petitioner, Serving for Success Consulting Ltd.

[6] On September 18, 2010, inspectors employed by the respondent General Manager went to Soprano's and saw something there that they thought was a violation of the liquor licence.

[7] On October 12, 2010, the receiver applied for the transfer of the liquor licence to his name and in the process provided to the respondent a copy of the August 20, 2009, order by which the receiver was appointed. The respondent General Manager

thus had notice of the provisions of paragraphs 6 and 7 of the order appointing the receiver, and I will quote those provisions later in this decision.

[8] On November 22nd, 2010, the respondent General Manager, (although various of his staff people are performing the functions I am attributing to him) drew up a notice of enforcement action arising out of those events of September 18 witnessed by the investigators.

[9] The notice of enforcement action was provided to the receiver on November 24, 2010. On December 6, 2010, the liquor licence was transferred from City Centre Holdings Ltd. to City Centre Holdings / D.R. Manning & Associates Inc. There was no evidence that the transfer or reissue, or whatever in fact occurred, of the licence on December 6, 2010, was communicated to the receiver before he signed the waiver in question in this proceeding.

[10] On December 7, 2010, the receiver signed a form of waiver provided to it by the respondent General Manager. In that form of waiver, the receiver agreed and acknowledged that the alleged infraction had occurred. He accepted and agreed to the proposed enforcement action specified in the notice the receiver received November 24, and agreed to a seven-day suspension of the liquor licence between dates set out in the notice. The receiver also, in that document, waived the opportunity to an enforcement hearing in respect of the contravention alleged in the notice it had received.

[11] The next day, that is December the 8th, 2010, the operator of the Soprano's lounge, Serving For Success Consulting Ltd., objected to the waiver having been signed, and the receiver, having been given notice of this objection, telephoned the respondent's representative, the receiver says on December 9, the General Manager's representative says on December 8; it is not material which of them is accurate as to the date. The purpose of the telephone call, however, was so that the receiver could withdraw the waiver he had signed and communicated to the General Manager on December the 7th.

[12] The receiver and the General Manager's representative disagree as to what was said in this telephone conversation. The receiver says that he was told he could withdraw the waiver and that the matter would proceed to a hearing. The receiver said that with that information he informed the General Manager's representative that he did withdraw the waiver. The receiver goes on to say that the General Manager's representative told him that the waiver was withdrawn and that the matter would proceed to a hearing.

[13] The General Manager's representative agrees that the receiver asked him to hold off on the waiver, but he says his response to that went no further than to say that the receiver should leave it with him and he would see what he could do. The General Manager's representative does not recall saying that he would or could withdraw the waiver.

[14] I note that immediately above the signature of the receiver on the form of waiver these words appear:

The licensee understands and agrees that this waiver notice is irrevocable.

[15] Several days later, the deputy General Manager determined that the waiver was indeed irrevocable and would not be withdrawn, and the receiver was so informed.

[16] The petitioner's arguments here fall under two broad categories. First, that without the written consent of the receiver or an order of the court, the General Manager's enforcement proceedings are a nullity. Second, that the waiver was withdrawn with the General Manager's promise that there would be a hearing, and that therefore the petitioner is entitled to the hearing promised.

[17] I will deal with the first broad basis for the attack set out in the petition. This argument refers to the portion of the order appointing the receiver. That order reads in paragraphs 6 and 7, first paragraph 6:

6. This court orders that no proceeding or enforcement process in any court or tribunal (each a "proceeding") shall be commenced or continued against

the receiver except with the written consent of the receiver or with leave of this court.

7. This court orders that no proceeding against or in respect of the debtor or the property shall be commenced or continued, except with the written consent of the receiver or with leave of this court and any and all proceedings currently underway against or in respect of the debtor or the property, except the subject proceedings, are hereby stayed and suspended pending further order of this court.

[18] Paragraph 7 does go on, but it is not material to anything I have to decide.

[19] The petitioner argues that the notice of enforcement issued by the respondent is either or both of a proceeding or an enforcement as contemplated in paragraph 6 of the order, and that the respondent is a tribunal as contemplated in that same paragraph. The petitioner argues that it did not consent to the enforcement and that there is no evidence of a court order allowing the enforcement, and that without one or the other the Manager's enforcement action is a nullity.

[20] The respondent argues that it sent a notice of proposed enforcement action to the receiver, and that by signing the waiver the receiver consented to the proposed enforcement proceeding. The notice of enforcement action dated November 22nd, 2010, and delivered to the receiver on the 24th says, in part:

The purpose of this notice is to inform you that the General Manager is taking enforcement action for the alleged contraventions.

And later:

The General Manager will consider the information contained in this notice at the enforcement hearing.

[21] In my view, the question comes down to whether the waiver went beyond the terms contained in it to extend to, and to constitute, a consent to the respondent's enforcement process, to bring it within the terms of the court order appointing the receiver. In my view, even if the petitioner's waiver did amount to such a consent at the time the waiver was signed, this consent -- that is, a consent to the enforcement action -- was withdrawn when, on December 8 or 9, the petitioner telephoned and attempted to withdraw the waiver.

[22] Although the waiver of the enforcement hearing under the *Liquor Control and Licensing Regulation* was, on its face, irrevocable, I do not find that consent within the terms of the court order, paragraph 6 or 7, is similarly irrevocable. While the consent of the receiver could not be withheld unreasonably, that is consent to the enforcement action proposed, I do not find that it was unreasonable in the circumstances for the receiver to have withdrawn his consent to an enforcement action without a hearing.

[23] It is relevant to my mind that the receiver withdrew the consent, if that is what it is considered to be, to the enforcement action in a timely manner and before any enforcement action or penalties had been imposed. It is also relevant that the withdrawal of consent was limited in its nature. The receiver did not withdraw his consent to an enforcement action generally, but merely to an enforcement action taken without a hearing.

[24] As a result, I am satisfied that any enforcement action that would be taken against the receiver without a hearing would be a nullity pursuant to the August 20, 2009, court order appointing the receiver.

[25] Having made that determination, I would not make any further orders or declarations. The General Manager remains at liberty to pursue such enforcement proceedings to which the receiver consents and, as I have already said, the receiver will not unreasonably withhold consent. If the General Manager wishes to pursue an enforcement action to which the receiver does not consent, the General Manager may, pursuant to the August 20, 2009, order of this court, seek the leave of this court to proceed.

[26] Is there anything further?

[27] MS. MASON: I don't believe so, My Lord.

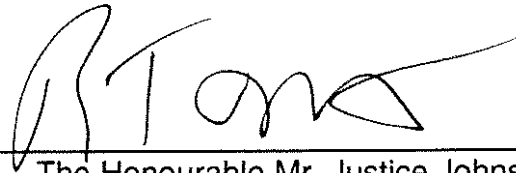
[28] THE COURT: Mr. Zaitsoff?

[29] MR. ZAITSOFF: Just the issue of costs, My Lord.

[30]

[SUBMISSIONS RE COSTS]

[31] THE COURT: It does seem to me that the position of the General Manager should prevail on the question of costs, and I say that primarily because the receiver did not raise the question of the lack of its consent to the enforcement process until the petition was issued, and in any event, I think the weight of the authority favours the General Manager's position, so there will be no costs of this proceeding.



The Honourable Mr. Justice Johnston