

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Sandman Hotel Langley v.(British Columbia)***
General Manager of Liquor Control and Licensing,
2005 BCSC 197

Date: 20050216
Docket: 36516
Registry: Kamloops

Between:

Sandman Hotel Langley Inc., dba Sandman Hotel (Langley) operating as The Shark Club

Petitioner

And

General Manager Liquor Control & Licensing Branch

Respondent

Before: The Honourable Mr. Justice Powers

Reasons for Judgment

Counsel for the Petitioner

J.B. Carter

Counsel for the Respondent

L. Greathead

Date and Place of Trial/Hearing:

January 20, 2005
Kamloops, B.C.

[1] The petitioner, Sandman Hotel Langley Inc., doing business as Sandman Hotel (Langley) operating as The Shark Club (“Sandman”) seeks to review, under the ***Judicial Review Procedure Act***, [RSBC 1996] c. 241 (“***JRPA***”) a determination that it contravened the provisions of the ***Liquor Control and Licensing Act*** [RSBC 1996] c. 267 (“***LCLA***”).

[2] The general manager of the Liquor Control and Licensing Branch alleged that the petitioner had contravened the regulations as follows:

(a) That on December 13, 2003, the licensee contravened Section 35 of the *Act* by permitting a minor to enter on or be on the premises where liquor is sold or kept for sale:

[3] An enforcement hearing occurred before the enforcement hearing adjudicator, Edward Owsianski, on May 11 and 27, 2004, and his decision is dated June 24, 2004. The adjudicator found that the contravention had occurred, and imposed a penalty of a two-day suspension of the operation of the club.

BACKGROUND:

[4] Sandman operates a hotel in Langley, British Columbia. The hotel has a food and beverage establishment known as The Shark Club. The petitioner says it is one business entity, but with two distinct liquor licenses, a liquor primary license #178849 and a food primary license #179638. The liquor primary license is on the main floor and the food primary license is on the second level. The plans which were filed in evidence indicate that it is possible that access can be obtained to the second level, the food primary license area, without going through the liquor primary license area. The plans also indicate that there is a staircase which connects the food primary license on the second level to the liquor primary license on the main level.

[5] The alleged breaches occurred when a liquor inspector attended the premises on December 13, 2003. The inspector was in the company of two police officers. The inspector was there to conduct a count of the number of people in the premises. While doing so, the inspector noticed a young looking woman in the liquor primary licence area, and pointed her out to the police officers. Subsequently, the woman was identified and found to be 15 years of age. The inspector believed at that time she looked to be 15 to 16 years of age. The minor was aware that she was not to be in the dance floor area of the liquor primary license area. She was aware that she would have to attempt to get in without producing her identification.

[6] Two doormen were stationed outside the front entrance, two uniformed security personnel were to the right of the entrance and one staff person was inside the front entrance. The evidence was that she waited until the doormen were distracted and then gained entry. She was not asked for identification at the door.

ISSUES:

[7] The petitioner argued that a correct interpretation of s. 35 of the **LCLA** and of s. 9 and 11 of the regulations make it clear that the petitioner was not in breach of the **LCLA**.

[8] Alternatively, the petitioner argues that the adjudicator failed to consider, or failed to give proper consideration to the defence of due diligence.

[9] The petitioner seeks to have the decision quashed based on its interpretation of s. 35, or alternatively, remitted to the respondent for reconsideration of the issue of due diligence.

STANDARD OF REVIEW:

Section 35:

[10] The interpretation of s. 35 was not argued before the adjudicator and no decision was made on that point. Therefore, no question arises as to what the standard of review might be on that issue.

Due Diligence:

[11] Both counsel referred to the decision **Zodiac Pub Ltd. (c.o.b. Zodiac Neighbourhood Pub) v. British Columbia (General Manager Liquor Control and Licensing Branch)** 2004 BCSC 96, where the court considered a standard of review on a decision made pursuant to the **LCLA**. The court discussed the standard of review at ¶6 through 16. Counsel agree here that the standard of review is reasonableness simpliciter.

ANALYSIS:

Section 35:

[12] Section 35 provides:

35 A person who holds a licence under this Act or who sells liquor under the *Liquor Distribution Act*, or the person's employee, must not authorize or permit a minor to enter on or to be on premises where liquor is sold or kept for sale except

...

(c) in prescribed circumstances.

[13] The **LCLA** regulations provide in s. 9:

9 The following terms and conditions apply to liquor primary licences and liquor primary club licences:

(a) minors are not allowed in the licensed establishment unless

(The exceptions under this regulation do not apply to this case).

[14] Regulation 11 dealing with food primary licences provides:

11(2) The following terms and conditions apply to a food primary licence:

(a) minors are allowed in the establishment;

[15] Regulation 13 provides:

13(1) Subject to subsection (2), a liquor primary licence and a food primary licence must not be issued in respect of the same establishment.

(2) Subsection (1) does not apply to an establishment if

(a) the licensee for the establishment would, but for subsection (1) of this section, hold, in respect of the establishment, a liquor primary licence and a food primary licence, as a result of the operation of Part 8,

(b) the licences referred to in paragraph (a) remain in good standing, and

(c) all renewals of or amendments to the licences referred to in paragraph (a) are effected in accordance with this regulation.

[16] Part A deals with transitional provisions when there were a larger variety of liquor licenses. The effect of s. 71 is that a category of license held by a licensee immediately before December 2, 2002 that was an "A" license becomes a liquor primary licence. A "B" licence becomes a food primary licence. In the present case, the petitioner did hold an "A" licence for that area which has become the liquor primary licence area, and a "B" licence for that area which has become the food primary licence. Regulation 71(b) also provides that these new licenses are subject to the terms and conditions of that particular category of licence which it has become.

[17] The petitioner's position is that they have a food primary licence which covers the entire establishment and, therefore, are entitled to have minors in the entire establishment. They say that the reference to "establishment" in their food primary licence and regulations 11(2)(a) allow minors to be in that establishment. They say the establishment includes the entire operation of The Shark Club, including the area covered by the liquor primary licence.

[18] They refer to the definition of “establishment” in s. 1 of the **LCLA**:

“**establishment**” means a place or premises that may comply with the requirements of this Act and the regulations prescribing the qualifications of a place or premises for which licences may be issued, and includes within such a place or premises any area where liquor is manufactured, stored or served;

[19] They refer to the definition of “premise” in **Merriam-Webster Online Dictionary 2004** as:

a: a tract of land with the buildings thereon **b:** a building or part of a building usually with its appurtenances (as grounds)

[20] The petitioner refers to the liquor primary licence which shows establishment name Sandman Hotel (Langley) and licence name Sandman Hotel (Langley). They refer to the food primary licence which shows establishment name Sandman Hotel (Langley) and licence name The Shark Club. They argue that the food primary licence refers to the entire establishment Sandman Hotel (Langley). They also argue that this would include any area that might be covered by the liquor primary licence, therefore, pursuant to the food primary licence, would allow the presence of minors in the liquor primary licence as well.

[21] The respondent argues that the combined effect of s. 35 and regulations 9(a) and 11(2) is that minors are allowed in those parts of The Shark Club that have the food primary licence, but not those parts that have a liquor primary licence. They say only the area licensed under the food primary area falls within the exceptions in s. 35 regarding minors.

[22] The respondent argues that the word “establishment” in s. 9 of the regulations is modified by the type of licence, and in that context “establishment” is the part of the premises subject to the liquor primary licence. They make the same argument with regard to s. 11.

[23] In support of that argument, the respondent refers to s. 38 of the regulations which provides:

38(1) A licensed establishment must be separated from an unlicensed area in a manner that is satisfactory to the general manager.

(2) If one licensed establishment in respect of which one category of licence has been issued adjoins another licensed establishment in respect of which a different category of licence has been issued, the establishments must be separated in a manner that is satisfactory to the general manager.

[24] I would point out that the copies of the plans, which were filed when the licenses were originally applied for under the “A” and “B” category, distinguish between the areas which are covered by the “A” category and the “B” category. Those same areas would be the areas covered by the liquor primary licence and the food primary licence since the changes to the **LCLA**.

[25] The petitioner’s argument that there is only one establishment ignores the fact that the definition of establishment refers to a place or premises. The definition of premises that the petitioner has provided makes it clear that premises can mean a building or a part of a building. Therefore, it is certainly possible to have two premises in one building, therefore, two establishments in one building. The plans of The Shark Club also support the argument that the licenses in question covered different areas in the same building. They do not overlap, and despite the name on the licence under establishment, they do not cover the same area in the hotel. For the purposes of s. 35, the areas are two separate establishments.

[26] I find that the food primary licence does not provide an exception to the restriction in s. 35 regarding minors in the licensed primary area.

DUE DILIGENCE:

[27] The petitioner agrees that a minor was on the premises on December 13, 2003, but argues that the adjudicator did not give effect to the defence of due diligence or the argument that the petitioner took reasonable care to avoid the contravention.

[28] The petitioner refers to portions of the adjudicator's decision at page 27, where the adjudicator commented:

For this contravention to have occurred there was a lack of action and attentiveness on the part of management and staff at the establishment.

[29] The petitioner argues that in making that statement the adjudicator negated the possibility of there ever being a defence of due diligence.

[30] The petitioner refers to the additional comments:

During the course of the hearing I had the opportunity to observe the minor. She appeared no older than her 16 years.

[31] The petitioner argues that the adjudicator was using his own personal observations in a completely different context without any additional evidence to determine whether the person appeared to be a minor or not.

[32] The respondent says that these references to page 27 deal with the penalty portion of the decision, after the decision had been made with regard to due diligence.

[33] The respondent refers to page 24 of the decision, where the adjudicator said:

Counsel has argued that the licensee was duly diligent. The establishment has policies and procedures in place to prevent minors from entering the liquor primary area and to prevent overcrowding. I agree that there is no question that the licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with. For the reasons following, I am satisfied that that has not occurred in this instance.

[34] It is clear from that portion of the reasons that the adjudicator was well-aware of the defence of due diligence and accepted that it applied.

[35] The adjudicator also said:

The licensee has configured the establishment with the liquor primary and food primary areas adjacent to each other. Each area has different regulatory requirements. While minors are permitted in the food primary area, they are not permitted in the liquor primary area. The liquor inspector was aware that security personnel and door control staff checked for identification and that staff inside generally kept watch for minors. She was concerned that there were no controls inside to prevent minors from moving from the liquor [in the decision the word "liquor" has been struck out and a handwritten note of "food" marked] primary area into the food [in the decision the word "food" has been struck out and a handwritten note of "liquor" marked] primary area and she addressed her concerns to previous managers on several occasions. Changes were not made to address those concerns until the occurrence of the alleged contravention.

The handwritten changes obviously reflect the decision and the original typed reasons were in error.

[36] This is essentially why the adjudicator found the defence of due diligence could not apply. The petitioner was aware of the concerns the respondent had regarding control and movement between one area and the other, and had not taken any steps to address that.

[37] As I have said earlier, counsel have agreed that the standard of review for this decision is that of reasonableness simpliciter. As pointed out in the **Zodiac Pub** case at ¶16 quoting from the **Southam** decision, the standard of review involves looking to see if there are any reasons to support the decision. There could be a defect in the evidentiary foundation, or the logical process that leads to the decision.

[38] In the present case, the adjudicator heard evidence about the layout of the premises and the areas covered by the two separate liquor licenses. The adjudicator was aware that concerns had been raised about policing the access from one area to the other, and that no steps had been taken to remedy that. The adjudicator heard evidence that the minor in question waited for an opportune time to gain entrance, knowing that she might be checked for identification. The evidence also indicated that none of her friends had been checked for identification. The evidence indicated that although the doorman outside the entrance may have been distracted, there is no indication that the persons inside, who would also be involved in checking or observing people entering the premises, were distracted in any way. The adjudicator heard evidence that the liquor inspector was able to identify the minor as someone who appeared to be under age, simply by looking into the dance crowd from the upper level of the premises. Her evidence was that the person appeared to be 15 to 16 years of age. The adjudicator heard evidence that this minor had been in the premises for approximately an hour and a half.

[39] The petitioner argues that because there were doormen and people posted at the entrance to the portion of the building that contained both the liquor primary area and the food primary area, they were not required to take any steps to patrol the area adjoining these two premises, because they would know if any minors had entered through the door. I have not been pointed to any evidence that suggests that there were no other minors in the food primary area. The petitioner says that having people at the perimeter was sufficient and would eliminate any need for further control in the premises itself. However, given the petitioner's own procedures, it would recognize that a perimeter check by itself is not sufficient. The procedures included having staff keep watch for minors inside. Those procedures appear to have been inadequate in this case and the adjudicator has determined that they did not amount to due diligence.

[40] It was certainly reasonable for the adjudicator to conclude that these procedures were not being properly followed, and that they were inadequate procedures to control movement from one area to the other. The minor was a person who appeared to be a minor to the liquor inspector, was spotted relatively easily and had been in the premises for an hour and a half.

[41] Applying the test of reasonableness simpliciter to the adjudicator's decision, I conclude that it was a reasonable decision and should not be set aside. As pointed out by Mr. Justice Blair in the **Zodiac** decision at ¶39:

The adjudicator had the advantage of hearing the witnesses and his findings, based on their evidence, deserve considerable deference by the court in a judicial review. It is not appropriate for a reviewing court to re-weigh the evidence before the adjudicator.

[42] As Justice Blair did in **Zodiac**, I find the adjudicator's conclusion regarding due diligence to be reasonable and consistent with his findings of fact on the evidence as a whole.

CONCLUSION:

[43] The petition is dismissed with costs.

"R.E. Powers, J."
The Honourable Mr. Justice R.E. Powers