IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20100318
Docket: S094674
Registry: Vancouver

In the Matter of the Judicial Review Procedure Act,

R.S.B.C. 1996, c. 241

Between:

The Longhorn Pub Ltd.
dba Carleton Lodge (Longhorn Pub)

Petitioner

And:

The General Manager,
Liquor Control and Licensing Branch

Respondent

Before: The Honourable Mr. Justice Silverman

Oral Reasons for Judgment

In Chambers
March 18, 2010

Counsel for the Petitioner	D.S. Gray
Counsel for the Respondent	R. Mullett
Place of Hearing:	Vancouver, B.C.

[1] **THE COURT:** These are oral reasons. The petitioner applies under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, for an order in the nature of *certiorari* quashing a decision of the enforcement hearing adjudicator dated November 3, 2008 under the *Liquor Control and Licensing Act* pursuant to s. 2 of the *Judicial Review Procedure Act*.

[2] The decision under review is one of an adjudicator acting under the *Liquor Act* after a hearing in which the adjudicator ruled with respect to an alleged contravention under s. 64 of the appropriate regulation of the *Liquor Act*.

[3] The adjudicator determined that the petitioner had contravened the section by permitting more persons in the petitioner's licensed establishment than was permitted by its licence.

[4] That fact was not disputed then, nor is it disputed before me. Rather, the defendant raised was one of due diligence. The adjudicator considered it and rejected it. The argument before me is that in considering it, the adjudicator erred in law in three different ways:

1. by framing near the outset of the decision, issues to be decided which excluded due diligence, or rather was silent with respect to whether or not due diligence was one of those issues;
2. by applying the wrong test for due diligence; and
3. by making a finding of fact vital to the question of due diligence for which there was no basis in the evidence.

[5] It is common ground that if the adjudicator made a pure error in law, I would then have jurisdiction under the *JRPA* to interfere with the decision. I will expand upon each of the three alleged errors in law.

[6] First, the argument with respect to the framing of the issues arises from page 3 of the written decision, where the bold-faced heading "Issues" is followed by the following:

1. Did the contravention occur?

2. If so, is a penalty appropriate, and what is a reasonable penalty?

[7] The obvious literal reading of that suggests that the mere finding of too many people on the premises would result in a finding that the contravention had occurred without the consideration of what is agreed to be the most important issue in the case, and that is the question of due diligence.

[8] The second of the alleged errors, the question of whether or not the wrong test for due diligence was applied, is this. That while the adjudicator correctly set out the test for due diligence at an earlier part of his judgment, in the penultimate paragraph a different test was applied, and that different test was wrong. The correct statement of the test is at page 12 of the decision where the adjudicator said this:

> 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.

[9] There is no argument between the parties but that that is the correct test. But it is a page later, where a different test, the petitioner argues, is applied when the adjudicator says this:

> He knew, or ought to have known that providing live entertainment in the main area would act as an attraction for persons on the patio to enter into the main area. That it had not occurred in the past, provided no guarantee that it would not occur, particularly if the entertainment was particularly popular.

[10] The petitioner argues that the use of the word "guarantee" is something significantly different than the correct phraseology, which appears earlier in the judgment, of "reasonable" or "reasonable steps". Due diligence is founded on the notion of reasonable steps. What the adjudicator ultimately did was required a guarantee, which is something far more significant than "reasonable". It is a

standard of perfection rather than a standard of reasonableness and that is an error in law, the petitioner argues.

[11] The third argument with respect to error in law is the finding of a fact vital to the question of due diligence for which there is no evidence, and that is also found in the same penultimate paragraph just a few sentences after what I have read a moment ago, where the adjudicator says this:

> There is no evidence that the hosts responsible for monitoring the entrance from the patio into the main room took any action to prevent the surge of persons into the main area.

[12] The petitioner argues that it is wrong to say that there is no evidence of that. There is evidence, and it is found earlier in the judgment itself at page nine, where the adjudicator is speaking about licensee witness D, and the adjudicator says this:

> When the guest singer commenced her performance it created an influx of persons from the patio to the main area inside. He was about to take corrective action when the liquor inspector arrived.

[13] The argument is that how could the directing mind of the petitioner have taken steps when the liquor inspectors prevented that from occurring. That clearly is something relevant to, and which should not have been ignored as a matter of law, the question of the adjudicator deciding whether or not "there is no evidence" that any steps were taken. All of that bears on the question of due diligence.

[14] I will give my final decision now and then explain my reasons. I am satisfied that this application must fail. After consideration of the arguments and the decision, I am satisfied that I am simply left with no jurisdiction to interfere with the decision.

[15] My reasoning is as follows. Whether or not the correct test has been applied with respect to due diligence is not a pure question of law. In this case, it is rather a question of mixed fact and law. That means that the decision with respect to that point at least, is one which was based on discretion and, therefore, the correct standard to be applied by me to that decision is not one of correctness, but rather one of reasonableness.

[16] Further, in determining reasonableness, I am required to give deference to the adjudicator. That is a decision that is with respect to the question of due diligence being one of mixed fact and law for which there is judicial precedent. In this regard, I have been referred to a number of cases including *Miller's Landing*, 2009 BCSC 1352, and *Cambie Malone's Pub*, 2009 BCSC 987.

[17] I am satisfied, on a consideration of all the evidence, that this decision was reasonable and, therefore, cannot be interfered with by me.

[18] Further, with respect to the use of the word "guarantee" in the decision, I agree with the petitioner to the extent that the word used was an unfortunate one. It would be far better if it had been more consistent with the use of the word "reasonable". However, the law is clear, and does not permit me to dissect the decision into separate words or sentences, or even paragraphs, to the extent of parsing out particular thoughts or phrases. Rather, I am required to consider it as a whole to determine if it was reasonable. There is ample authority for that proposition, including *R. v. H.S.B.*, 2008 SCC 52.

[19] It is the reasonableness of the finding which is at issue here, not the sufficiency of the wording of the judgment. That is a paraphrase which can be found in a variety of cases, including *R. v. Barrett*, [1995] 1 S.C.R. 752.

[20] I am satisfied, on a reading of the entirety of the judgment, that the adjudicator did know and did apply the correct test for due diligence, although the unfortunate word "guarantee" was used, and did so reasonably.

[21] A similar comment applies with respect to the unfortunate aspect of the judgment which omits as one of the issues the heading of due diligence. Clearly, it should have been included so that there would have been three issues instead of two, but I am satisfied that error is more in the nature of a clerical error than it is anything else. It is clear that although it was not listed as one of the issues, the adjudicator did go on to consider it in the judgment as one of the issues and makes it very clear that the adjudicator was aware that the defence of due diligence was at

stake and something which the petitioner was entitled to raise and which had to be considered, and was considered.

[22] With respect to the finding of fact issue, I am in agreement with the petitioner to the extent that the finding of fact referred to is a vital one to the question of due diligence. However, I am satisfied that there was indeed a lack of evidence as referred to in the judgment as I have already quoted. Just before the phrase, "There is no evidence that the host responsible for monitoring the entrance from the patio into the main room took any action to prevent the surge of persons into the main area", just before that, the decision reads as follows:

> One of the purposes of providing entertainment is to attract persons to the establishment. At the very least, he could have alerted the host to the possibility and instructed them that it was not to be allowed to occur.

[23] It is clear to me that the adjudicator's comment that there is no evidence refers to before the entertainment started, with the knowledge that the entertainment was going to start, and the knowledge that entertainment is there in order to increase the number of persons coming into the establishment. And that is what the decision refers to, in my mind, and does so clearly when it notes that there is no evidence that there were any steps taken at that earlier time. Consequently, I am satisfied that there is a basis for that comment in the decision, and it is not, therefore, an unreasonable comment to be made.

[24] The entirety of the decision, in my view, is reasonable, and applies correct principles and, consequently, I have no jurisdiction under the *JRPA* to interfere with it. It follows that the petition must be dismissed.

The Honourable Mr. Justice Silverman